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IN THE

Supreme Court Of The United States

October Term, 1983

No._____

DENNIS M. PERRUCCIO, Appellant

v.

STATE OF CONNECTICUT, Appellee

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Section 53-21 of the Connecticut General Statutes is unconstitutionally vague in violation of the Fourteenth Amendment to the United States Constitution?

2. Whether Section 53-21 of the Connecticut General Statute is unconstitutionally vague as applied to the Appellant in this case in violation of the Fourteenth Amendment to the United States Constitution?

3. Whether 53-21 is constitutional within the rule of *Rose v. Locke*, 423 U.S. 48 (1975) and the broad meaning doctrine?

4. Whether Section 53-21 of the Connecticut General Statutes, a felony, forms an unconstitutional statutory pattern with the sex offense statutes, particularly Section 53a-73a(a)(1)(A), a misdemeanor, which are part of the Connecticut Penal Code, in violation of the Fourteenth Amendment to the United States Constitution?

PARTIES

The caption of the case contains the names of all of the parties.

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The opinion of the Supreme Court of Connecticut, which appears in Appendix A hereto, p. 24, *infra*, is officially reported at 192 Conn. 154 (1984). The order of the Connecticut Supreme Court denying reargument appears in Appendix B hereto, p. 35, *infra*.

IN THE
Supreme Court Of The United States

October Term, 1983

No. _____

DENNIS M. PERRUCCIO, Appellant

v.

STATE OF CONNECTICUT, Appellee

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

Dennis M. Perruccio, the Appellant, appeals from the final judgment of the Supreme Court of the State of Connecticut dated January 31, 1984, rehearing denied March 7, 1984, affirming his conviction and the constitutionality of *Conn. Gen. Stat.* (Rev. 1958, Supp. 1984) Sec. 53-21. The Defendant challenged Section 53-21 as unconstitutionally vague and as forming an unconstitutional statutory pattern with the sex offense statutes of the State of Connecticut. In affirming the Appellant's conviction, the Supreme Court of the State of Connecticut sustained the constitutionality of Section 53-21 of the Connecticut General Statutes and the constitutionality of the statutory pattern of the sex offense statutes and Section 53-21. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Connecticut on March 20,

1984. An Amended Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Connecticut on May 22, 1984. The Notice and the Amended Notice appear in Appendix C hereto, p. 36 *infra.*

The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257 (2).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment — United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED & PENAL CODE COMMENT

Section 53-21 of Connecticut General Statutes:

> Section 53-21. Injury or risk of injury to children
>
> Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both.

Section 53a-2 of the Connecticut general Statutes:

The provisions of this title shall apply to any offense defined in this title or the general statutes, unless otherwise expressly provided or unless the context otherwise requires, and committed on or after October 1, 1971, and to any defense to prosecution for such an offense.

Commission Comment — 1971

The purpose of this section is two-fold. First, it makes clear that the Code only applies to offenses committed on or after October 1, 1971 and to defenses thereto. The question of whether a particular offense begun on September 30, 1971 and completed thereafter comes within the code is left to judicial elaboration. Second, it applies the general provisions of the Code not only to the offenses defined in the Code but to the other offenses scattered throughout the General Statutes, except where otherwise provided, either expressly or by implication of the context. These general provisions are contained in section 53a-3 (definitions), sections 53a-4 to 53a-23 (principles of criminal liability and defenses), sections 53a-24 to 53a-27 (definitions and classification of offenses), sections 53a-28 to 53a-44 (sentences), and section 53a-47 (procedure upon acquital on grounds of mental disease or defect).

Section 53a-65 of the Connecticut General Statutes:

As used in this part, except section 53a-70b, the following terms have the following meanings:

(1) "Actor" means a person accused of sexual assault.

(2) "Sexual intercourse" means vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however, slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an

object manipulated by the actor into the genital or anal opening of the victim's body. Its meaning is limited to persons not married to each other.

(3) "Sexual contact" means any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor.

(4) "Mentally defective" means that person suffers from a mental disease which renders such person incapable of appraising the nature of such person's conduct.

(5) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling such person's conduct owing to the influence of a drug or intoxicating substance administered to such person without such person's consent, or owing to any other act committed upon such person without such person's consent.

(6) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(7) "Use of force" means: (a) use of a dangerous instrument; or (b) use of actual physical force or violence or superior physical strength against the victim.

(8) "Intimate parts" means the genital area, groin, anus, inner thighs, buttocks or breasts.

Section 53a-73a of the Connecticut General Statutes:

(a) A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age, or (B) mentally defective or mentally incapacitated to the extent that he is unable to consent to such sexual contact, or (C) physically helpless, or (D) less than eighteen years old and the actor is such

person's guardian or otherwise responsible for the general supervision of such person's welfare, or (E) in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over such other person; or (2) such person subjects another person to sexual contact without such other person's consent, or (3) such person engages in sexual contact with an animal or dead body.

(b) Sexual assault in the fourth degree is a class A misdemeanor.

STATEMENT OF THE CASE

This case concerns the constitutionality of Section 53-21 of the Connecticut General Statutes as applied to the Defendant, Dennis Perruccio. The case on appeal pertains to an incident on October 16, 1981 involving a thirteen year old girl. The jury may have found that the Defendant, a shop teacher at a State technical school followed this girl into an empty locker room and asked for a good-bye kiss. She then kissed him on the cheek; the Defendant kissed her, then put his right hand underneath her shirt and felt her left breast, outside of her bra. He then pushed her bra up and felt the breast again. As a result of this alleged conduct, the State charged the Defendant with a violation of 53-21 of the Connecticut General Statutes and 53a-73a(a)(1)(A). *See, Substituted Information,* Appendix C, p. 1, *infra.* The jury found the Defendant guilty of both counts, and, on appeal the Connecticut Supreme Court sustained the constitutionality of 53-21.

The Defendant has challenged the constitutionality of 53-21 at each stage of the proceeding beginning with a Motion to Dismiss; later, during the trial, after the State's presentation of its evidence, the Defendant made extensive argument on a Motion for Judgment of Acquittal and provided the court with a nine page trial brief of the Risk of Injury Statute (See, TR pages 262-308.) During this argument and in the Brief the Defense gave the trial Court citations

to federal cases as well as citations to cases in other jurisdictions. The Defendant also provided the trial Court with written requests to charge and the trial Court refused to charge as requested. After the verdict the Defendant filed a Motion to Set Aside and a Motion to Arrest the Judgment which were also denied by the trial Court. On appeal to the Connecticut Supreme Court the Defendant again continued his attack on the constitutionality of 53-21 and the Connecticut Supreme Court denied this claim.

STATEMENT OF THE REASONS WARRANTING PLENARY CONSIDERATION OF THIS APPEAL

I. SECTION 53-21 OF THE CONNECTICUT GENERAL STATUTES IS UNCONSTITUTIONALLY VAGUE AND VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The threshold analysis to determine whether a statute can withstand a constitutional attack for vagueness requires consideration of three salient factors. The first factor seeks fair notice to the Defendant as described in *Connally v. General Construction Company,* 269 U.S. 385, 391 (1926) as follows:

> ... a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *United States v. Harress,* 347 U.S. 612, 617 (1954).

Although laws may be general in nature, the Constitution does require a sufficiently definite warning of the proscribed conduct when measured by common understanding and practices. *Jordan v. DeGeorg,* 341 U.S. 223, 231-32 (1951).

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939).

The second factor evaluates the standards for law enforcement officials. This assesses whether the statute gives undue discretion to prosecutors to decide what constitutes the crime which leads to arbitrary enforcement. When a law is indefinite it

> ... does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat. *Cox v. Louisiana,* 379 U.S. 559, 579

(1965), (Separate opinion of Justice Black) *reh. den.*, 380 U.S. 926 (1965); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

The third factor concerns sufficient standards to guide a judge and jury. Statutes must not leave judges and juries free to decide, without legally defined standards, what conduct a statute prohibits. *Smith v. Goguen*, 415 U.S. 566, 572-573 (1974). Legislatures cannot abdicate their responsibilities for setting the standards of the criminal law, *e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-169 (1972).

Section 53-21 on its face fails to satisfy these minimum criteria. A statute which prohibits acts "... likely to impair the morals of a minor" hardly warns the ordinary person in clear and concise terms of the prohibited conduct. "Morals" even as defined by lexicographers leaves much open to doubt or variation. Moreover, the morals of society constantly change. What was not considered good and decent twenty-five years ago is often acceptable today. No satisfactory definition exists. *See, e.g., Ricks v. District of Columbia*, 414 F.2d 1097, 1106-1107 (DC.DC., 1968). Our own Connecticut Supreme Court recognized in 1920 that a satisfactory definition or explanation of the term has never yet been attained. *See, Drazen v. New Haven Taxicab Company*, 95 Conn. 500, 507 (1920).

> The concept of morality has occupied men of extraordinary intelligence for centuries, without notable progress (among even philosophers and theologians) toward a common understanding. *Gesicki v. Oswald*, 366 F. Supp. 371, 374 (DC.NY, 1971), *aff'd* 406 U.S. 913 (1972).

The language of 53-21 is inherently defective and fails to establish standards for the law enforcement official; it gives to the prosecutor unlimited discretion and can fit the fancy of any prosecutor. *Musser v. Utah*, 333 U.S 95, 96-97 (1948). Finally, 53-21 lacks standards to guide the judge or the jury.

II. SECTION 53-21, AS APPLIED ON THE FACTS OF THE PRESENT CASE, AND, IN THE CONTEXT OF PRIOR JUDICIAL DECISIONS INTERPRETING 53-21, STILL VIOLATES THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

A. Facts of Present Case.

The Defendant's conduct consisted of an episode of touching the breasts of the victim by sliding his hand up her blouse and kissing her on the mouth (*See*, Appendix E.1 and E.2, *infra.*). It is this episode which describes the full range of facts the State claimed were *likely* to *impair* the *morals* of the minor.

B. The Judicial Gloss and Fair Warning.

While an accused may violate 53-21 through willful creation of a situation inimical to the life or limb of a victim, the State accused the Defendant, Perruccio, with perpetrating acts *directly on* a person under age 16. The Substituted Information, Appendix D, *infra*, specifically charged that to Defendant:

> ... did commit the crime of injury or risk of injury to or impairing the morals of a child, in *violation of Section 53-21* of the Connecticut General Statutes, in that said DENNIS M. PERRUCCIO *did do certain acts likely to impair the morals* of a female child under the age of sixteen years, to wit, who was then thirteen years old, having been born on December 23, 1967, *in that he put his hand under her clothing and bra and felt of her left breast and kissed her on the mouth.* (Emphasis added)

In every respect, this charge involved a "touching" offense and acts directly perpetrated on a victim, not the creation of an inimical situation or deliberate indifference to the creation of an inimical situation. *See, State v. Perruccio, supra.*, at 159.

In *State v. Pickering*, 180 Conn. 54, 63 (1980), the Connecticut Supreme Court wrote that the meaning of the words "acts likely to

impair the ... morals ..." have been explicitly elucidated through several opinions of the court. The court went on to say that consulting the statute (53-21) *and the cases* would provide fair warning:

> This Court's opinions pursuant to 53-21 make it clear that the deliberate touching of the *private parts* of a child under the age of sixteen in a sexual and indecent manner is violative of that statute. *Id.*, at 64.

The Connecticut Supreme Court did *not then articulate*, as it has now stated, in its earlier "classifications" of the meaning of 53-21, that touching "intimate parts" as opposed to "private parts" would constitute a violation of 53-21. This *new* statement of the sweep of 53-21 now appears for the first time in *State v. Perruccio* and reads:

> These opinions serve to warn a potential violator that the deliberate touching of the private *or intimate parts* of a child under sixteen in a sexual and indecent manner is prohibited. (Emphasis added) *State v. Perruccio, supra.*, at 161. *Compare, State v. Smith,* 183 Conn. 17, 22 (1981).

The earlier opinions do not serve to warn, and in fact, even mislead, because they *refer specifically* to private parts. Henceforth, the Connecticut Supreme Court may have provided warning; however, such warning from the earlier cases did not exist before the decision in *State v. Perruccio.* The earlier reported cases do not indicate that one can be prosecuted for a violation of 53-21 because of deliberate *touching* of the *breasts or any part of the body* which is not "private parts". The Court could simply have said in *Pickering* or *Smith*, that:

> ... deliberate touching of the *intimate parts* ...

would constitute a violation. The Connecticut Court chose not to do so and referred specifically to the term "private parts". Both *Pickering* and *Smith* were decided by the Connecticut Supreme Court *after* the adoption of the Connecticut penal code and the term

"intimate parts" could easily have been referred to or adopted by the Court. The term "intimate parts" is more expansive than the term "private parts"; yet, the Connecticut Supreme Court elected not to adopt the broader classification in earlier cases and thus did not provide a sufficient warning.

When the Connecticut Supreme Court decided the challenge to 53-21 in *State v. Pickering, supra.*, it referred to several specific cases and wrote:

> In the present case, the meaning of the words "acts likely to impair the ... morals of any child (under the age of sixteen years)" have been repeatedly and explicitly elucidated through several opinions of this court. In *State v Coulombe,* 143 Conn. 604, 124, A.2d 518 (1956), the offense involved the touching of the private parts of a nine year old girl. The defendant had "pulled up (her) dress and put down (her) pants .. and then *put his hands in (her) pants ... (b)etween her" and* he had "touched her flesh and moved his hands back and forth for a short while, hurting her." Id., 605-606. In *State v Anderson,* 152 Conn. 196, 197, 205 A.2d 488 (1964), the defendant performed fellatio on the victim, a ten year old boy, who cried when *subjected to this act.* In a number of other cases involving the statutory words at issue in Sec. 53-21, this court's opinions disclose that the conduct in question concerned *indecent acts perpetrated on the victim. See, State v Silver,* 139 Conn. 234, 237, 93 A.2d 154 (1952); *State v Blake,* 157 Conn. 99, 100, 249 A.2d 232 (1968); *State v Gelinas,* 160 Conn. 366, 367, 279 A.2d 552 (1971). *State v Pickering, supra* at 63-64 (emphasis added).

All of these cases involve touching of the genitals and did not involve touching of breasts or kissing. Reviewing chronologically the operative facts of each reported Risk of Injury case in Connecticut involving any sort of sexual touching, it should readily become apparent that by judicial interpretation, the touching of breasts and kissing have not been proscribed:

State v Silver, 139 Conn. 234 (1952)

Defendant called a ten year old and eleven year old girl into an apartment house and committed indecent assaults upon them. A physician testified that the girls hymen had been ruptured.

State v Coulombe, 143 Conn. 604 (1956)

Defendant put his hands in the pants of a nine year old girl, touched flesh, and moved his hands back and forth hurting her; a physician testified that he found swelling around the opening of the uretha and inflammation or irritation that would only result from traumatic means.

State v Dennis, 150 Conn. 245 (1963)

Defendant did certain perverted sexual acts with his seven year old daughter; acts, it was not disputed, which were of such base nature as would impair the morals of any child.

State v Anderson, 152 Conn. 196 (1964)

Defendants forced a ten year old boy into a bedroom, locked the door and performed acts of fellatio on the boy.

State v Gelinas, 160 Conn. 366 (1971)

No facts were presented in this case to describe the nature of the acts, although the conviction appealed from included two counts of indecent assault.

State v Manning, 162 Conn. 112 (1971)

Defendant committed indecent assaults on retarded children aged fifteen. This occurred before the age of consent was reduced to age 15.

State v. Hauck, 172 Conn. 140 (1976)

Defendant promised a grade of C to a student during school year, once or twice a week had student disrobe and photographed her; the Defendant also touched her private parts.

State v Pickering, 180 Conn. 54 (1980)

Defendant sexually molested his daughter to the point that the Court did not think it appropriate to give the full detail of the Defendant's bodily contact with and lewd touching of his daughter. Defendant repeatedly attempted to have sexual intercourse with the victim.

State v. Shaw, 186 Conn. 45 (1982)

Defendant, a male, took a six year old boy into an apartment, stripped him of his clothes and sexually molested him.

State v McCall, 187 Conn. 73 (1982)

The Defendant took a five year old girl to a bedroom, pulled down her pants and performed cunnilingus.

The "touching" cases then have only warned that touching private parts may constitute a violation of 53-21.

Connecticut Courts have never defined "private parts" in any of the cases.[2] However, cases in other jurisdictions have clearly emphasized that the term "private parts" does *not* include female breasts. *See, State v Crenshaw*, 597 P.2d 13; *State v Carter*, 123 Ariz. 524, 601 P.2d 287; *State v Blount*, 60 N.J. 23, 286 A.2d 36; *State v Jones*, 7 NC. App. 166, 171 S.E. 2d 468. "Private parts" is commonplace designation of the genital procreative organs. *State v Dennison*, 72 Wash. 2d 842, 435 P.2d 526. *See also, Pendell v State*, 158 Tex. Cr.R. 119, 253 S.W. 2d 426; *Clark v People*, 79 NE. 941.

As an example, in a prosecution for contributing to the delinquency of a child in an Oregon case where the government claimed that the accused kissed and hugged the minor and played with her breasts, the Court found that the testimony was *not* sufficient since the term "privates" or "private parts" as used in describing a part of the human body, refers to the genital organs and *not* the breasts.

> It is hornbook law that, whenever and wherever the terms 'privates' or 'private parts' are used as descriptive of a part of the human body, they refer to the genital organs. Every dictionary so defines them.
>
> ***
>
> A woman's breasts do not come within the designation of 'private parts'. Obviously they are not part of the 'genital organs'. *State v Moore,* 194 Ore. 232, 241 P.2d 455. *See also, State v Nash,* 83 N.H. 536, 145 A 262 ("private parts" includes organs of reproduction and their immediate vicinity).

Given the history of the case law in Connecticut and the emphasis on the term "private parts", there is no fair warning that touching breasts and kissing on the mouth would be a violation of 53-21. The Constitution has required fair warning, not ambush. Here, even a person of extraordinary intelligence, and, even a person with legal training, would have to guess at the reach of 53-21 as it applies to a "touching" case. In support of the unconstitutional ambush of the accused, the Connecticut Supreme Court attempts to apply the definition of "intimate parts" to 53-21 *via* Section 53a-2 of the Connecticut Penal Code. This extraordinary effort to rehabilitate 53-21 is wholly unfair. In the earlier cases, and most importantly in *Pickering* and *Smith,* the Connecticut Supreme Court never mentioned the applicability of 53a-2 and the application of the definitions in 53a-65 to Risk of Injury cases. Does this mean now that all penal code crimes involving a person under age 16 may constitute a Risk of Injury as well? If it were so clear that the definition of intimate parts should be used, why did the Connecticut Supreme Court in all earlier cases refer only to *private parts*? The decision in *Perruccio* brings back into focus the challenges raised in *Smith* concerning 53-21 as an *ex post facto* law. *Pickering* and its progeny do not "... make it clear that the type of acts for which the Defendant was convicted would long have been considered violations of the statute". *Smith, supra.,* at 24. The Defendants' behavior in the *Perruccio* case did not render him a violator as to whom the statute was not vague.

The Connecticut Supreme Court also states that opinions such as *State v. Coulombe,* 143 Conn. 604 (1956); *State v. Anderson,* 152 Conn. 196 (1964); and *State v. Dennis,* 150 Conn. 245 (1963) warn a potential violator that touching *intimate* parts constitute a violation of 53-21. Nothing in these cases involves touching of only the breasts or buttocks or pertain to kissing.

In each earlier "touching" case, the accused has gone *further* than just touching the non-dangerous zones of the victim's body. The Connecticut Supreme Court appears to redraw the line and this continuous line drawing and adjusting to fit each case fails to satisfy the Constitutional prohibitions against vague penal statutes.

Moreover, a Defendant would not be aware of the applicability of the definition of "intimate parts" to 53-21 *before* the *Perruccio* decision because one reading Section 53a-2 and the Comments would find a different intent:

Commission Comment - 1971

The purpose of this Section (53a-2) is two-fold.

***

Second, it *applies* the *general provisions* of the Code not only to the offenses defined in the Code but to the other offenses scattered throughout the General Statutes, except where otherwise provided, either expressly or by implication of the context. *These general provisions are contained in section 53a-3* (definitions) sections *53a-4* to *53a-23* (principles of criminal liability and defenses), sections *53a-24* to *53a-27* (definitions and classification of offenses), sections *53a-28* to *53a-44* (sentences), and section *53a-47* (procedure upon acquittal on grounds of mental disease or defect). (Emphasis added)

III. THE BROAD REACH APPROACH OF ROSE V. LOCKE, 423 U.S. 48 (1975), DOES NOT APPLY AND 53-21 VIOLATES THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

In *Rose v Locke*, 423 U.S. 48 (1975), this Court held in a 5-4 decision that a common law crime which had been codified could be saved if the common law definition afforded sufficient warning. This Court went further and held that the statute as applied would also survive a constitutional attack for vagueness if the State had previously indicated that the statute's proscription encompassed a broad meaning and "other jurisdictions had already reasonably construed identical statutory language to apply to such acts". *Id.*, at 53. Indeed, the Connecticut Supreme Court referred to *Locke* as some authority for its decision. *See, Perruccio, supra.*, at 159. So, in *Locke*, the State of Tennessee was allowed to reach up to the northeast section of the United States for the interpretation that Maine placed on the statute in order to supply the necessary judicial gloss to salvage the conviction.

However, 53-21 is not a common law crime. The portion of 53-21 which provides for the crime of "likely to impair the morals" of a minor was enacted in 1943 and was added to the "endangering" section of the statute. *State v. Dennis*, 150 Conn. 245 (1963). Cases in other jurisdictions have not been cited in the *Perruccio* case to support a broad reach approach. Connecticut has also no interpretation of the word "likely" as used with "morals". These words cannot be viewed in a vacuum independent of each other, but rather, must be read together. In other jurisdictions statutes which have used just the word "morals" and similar words have been struck down either facially or as applied to the particular case as violating procedural due process. *Musser v. Utah*, 333 U.S. 95 (1948), and on remand, 118 Utah 537, 223 P.2d 193: Conspiracy "to commit any act injurious ... to public morals"; *Ricks v. District of Columbia*, 414 F.2d 1097 (D. of C., 1968): "(a)ny person leading an immoral or profligate life..."; *Clark v. City of Fremont, Nebraska*, 377 F. Supp. 327 (D. of Neb., 1973): "good morals and decency" and "decency and morality"; *Gesicki v. Oswald*, 336 F. Supp. 371 (D. of N.Y., 1971), aff'd. 406 U.S. 913 (1972): "morally depraved"

and "in danger of becoming morally depraved"; *Oestreich v. Hale,* 321 F. Supp. 445 (D. of Wis., 1970): "demoralizing" and "immoral"; *State v. DeFrances,* 351 So. 2d 133 (La., 1977): "any immoral sexual purpose"; *State v. Hodges,* 254 Ore. 21, 457 P.2d 491: "any act which manifestly tends to cause any child to become a delinquent child". In the present case, the broad reach approach does not protect 53-21 from unconstitutionality.

IV. SECTION 53-21 AND 53a-73a(a)(1)(A) FORM AN UNCONSTITUTIONAL STATUTORY PATTERN IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The State charged the Defendant with both Risk of Injury and Sexual Assault 4th degree for the same conduct. Section 53-21, a felony with a maximum ten year sentence only requires proof of a general criminal intent. Essentially, the act itself constitutes the crime. *See State v. Shaw*, 186 Conn. 45 (1982). On the other hand, Sexual Assault 4th degree requires a specific intent and is a class A misdemeanor. This lesser offense becomes more difficult to prove. Less intrusive conduct may then form the basis of a more serious charge. Moreover, given the lack of prior cases holding that touching of breasts or kissing constitutes a risk of injury, the potential accused cannot read the various statutes and understand what is proscribed. The inconsistent pattern of the statutes selected by the legislature fails to provide adequate notice, makes it easier to commit more serious offenses, eliminates the lesser included offense category by requiring an extra element for the lesser offense; resulting in a denial of equal protection and both procedural and substantive due process. The pattern of the sex offense statutes and 53-21 weaves a fabric of discriminatory patterns and sets out classifications not based on natural and substantial differences germane to the subject or to the legitimate purpose of the legislation, *e.g., New Orleans v. Dukes,* 427 U.S. 297, 303 (1976).

CONCLUSION

53-21 requires one to speculate over its meaning and scope; no previous Connecticut court has held that the touching of breasts and kissing constitute a violation of 53-21; 53-21 as applied to sex offense cases weaves an unconstitutional pattern with the sex offense statutes in Connecticut and for these reasons this Court should note probable jurisdiction of the appeal. *Dunn v. United States*, 442 U.S. 100 (1979); *United States v. Batchelder*, 442 U.S. 114 (1979).

RESPECTFULLY SUBMITTED,

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APPENDIX A

STATE OF CONNECTICUT

v.

DENNIS M. PERRUCCIO

(11524)

(11525)

SPEZIALE, C.J., PETERS, PARSKEY, SHEA and GRILLO, Js.

Convicted, in one case, of the crimes of risk of injury to a child (§ 53-21) and of fourth degree sexual assault (§ 53a-73a[a][1][A]) in connection with an incident involving a thirteen year old female on October 16, 1981, and convicted, in another case, on three counts of the crime of risk of injury (§ 53-21) in connection with sexual activity involving a fifteen year old female on October 27 and November 3, 1980, the defendant appealed to this court, which granted his motion for consolidation of the appeals. *Held:*

1. With respect to the appeal in the matter involving the thirteen year old, the defendant's conduct rendered him a violator of § 53-21 as to whom that statute was not unconstitutionally vague; more, this court having previously held that the same act can constitute a violation of both § 53-21 and § 53a-73a(a)(1)(A), the necessary elements of which are distinct, the defendant's claim that he was deprived of the opportunity to be found guilty of fourth degree sexual assault as a lesser offense included in the crime of risk of injury and his further claim that he had been charged twice for the same offense in violation of the constitutional prohibition against double jeopardy were unavailing.

2. With respect to the appeal in the matter involving the fifteen year old, who was, under the applicable sections of the penal code (§ § 53a-71[a][1] and 53a-73a[a][1][A]), old enough to have consented to sexual activity, the trial court should have charged the jury on the issue of consent as requested by the defendant at trial; accordingly, that matter was remanded for a new trial with direction both that an instruction be given on consent and that the § 53-21 risk of injury charges be dismissed if consent were found to have been given, in which event the defendant would have had no warning that the activity in question was prohibited and consequently could not have violated § 53-21.

Argued October 12, 1983 — Decision released January 31, 1984.

Information charging the defendant, in the first case with the crimes of injury or risk of injury to or impairing the morals of, a child and sexual assault in the fourth degree; and, in the second case, with three counts of the crime of injury or risk of injury to, or impairing the morals of, a child; both cases were brought to the Superior Court in the judicial district of New London and tried to the jury before *Hendel, J.:* verdict and judgment of guilty of injury or risk of injury to, or impairing the morals of, a child and sexual assault in the fourth degree in the first case; verdict and judgment of guilty of three counts of injury or risk of injury to, or impairing the morals of, a child in the second case, and appeal by the defendant in both cases to this court. *No error in the first case; error in the second case; new trial.*

Edward T. Lynch, Jr., for the appellant (defendant in both cases).

Irving L. Aronson, assistant state's attorney, with whom, on the brief, was *C. Robert Satti,* state's attorney, for the appellee (state in both cases).

GRILLO, J. The charges in this case stemmed from separate incidents involving the defendant's sexual contact with two females under the age of sixteen. In the first case, the defendant was charged with risk of injury under General Statutes § 53-21[1] and sexual assault in the fourth degree under General Statutes § 53a-73a (a) (1) (A)[2] resulting from actions involving a thirteen year old female on October 16, 1981. In the second case, the defendant was charged with three counts of risk of injury under § 53-21 resulting from actions involving a fifteen year old female on October 27 and November 3, 1980.

---

[1]"[General Statutes] Sec. 53-21. INJURY OR RISK OF INJURY TO, OR IMPAIRING MORALS OF, CHILDREN. Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years of both."

[2]"[General Statutes] Section 53a-73a. SEXUAL ASSAULT IN THE FOURTH DEGREE: CLASS MISDEMEANOR. (a) A person is guilty of sexual assault in the fourth degree when: (1) such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age . . . ."

The jury might reasonably have found the following facts: At the time of the incident in the first case, the defendant, Dennis M. Perruccio, was an electronics shop teacher at Ellis Technical School in Danielson. A thirteen year old girl was enrolled in a one week introductory course in the defendant's shop program. On October 16, 1981, the defendant followed this girl into an empty locker room. When the defendant asked her for a good-bye kiss, she kissed him on the cheek. The defendant kissed her, then put his right hand underneath her shirt and felt her left breast, outside of her bra. He then pushed her bra up and felt her breast again. He tried to put his left hand down inside the back of her pants, but she resisted. A few days later the girl informed her parents of the incident. School officials were notified in mid-November.

In the second case, a fifteen year old girl met the defendant at a dance at Ellis Technical School in the spring of 1980. Although the girl was not a student at Ellis at the time, she enrolled there in the fall of 1980. On October 27, 1980, she remained alone after school with the defendant to make posters. The defendant had previously requested and received permission from the girl's mother allowing her daughter to remain after school. After the defendant told the girl that they had to go out to buy poster materials, they left the school together in the defendant's car and proceeded to the defendant's home in Norwich. When they arrived at the house, the defendant invited the girl into his house. They sat on a couch together, listened to music, and talked while the girl drank a beer. While on the couch, the defendant kissed the girl and touched her breasts under her clothes. The defendant then carried her into the bedroom, undressed her, and had sexual intercourse with her. The girl testified that she did not resist any of the defendant's advances or action because she was too afraid of what would happen if she tried to stop the defendant.

On November 3, 1980, the defendant again arranged to have the fifteen year old girl stay after school. They again went to the defendant's house and had intercourse. This time, however, both removed their own clothes. After both incidents, the defendant told the girl not to tell anyone because he would get into trouble. She, in

fact, did not inform anyone of these incidents until November of 1981 when she gave a statement to the police.

After consolidation of these two cases and a trial by jury, the defendant was found guilty of all charges.[3] The defendant timely appealed in each case, and on January 3, 1983, this court granted the defendant's motion for consolidation of the appeals.

In the first case involving the thirteen year old girl, the issues presented are: (1) whether § 53-21 as applied to the defendant is void for vagueness and thus unconstitutional, and (2) whether §§ 53-21 and 53a-65 et seq. form an unconstitutional statutory pattern and violate the principle of double jeopardy.

The defendant maintains that the application of § 53-21 in this case violates his due process rights since the statute is void for vagueness. He argues that his conduct was not violative of § 53-21 for two reasons: (1) the touching of the breast is not an act prohibited by § 53-21, and (2) even if this court decides that such an act violates § 53-21, the defendant did not have fair warning at the time the incident occurred. We disagree.

This court, in *State v. Pickering*, 180 Conn. 54, 428 A.2d 322 (1980), recently set out the basic principles to be considered when a statute is attacked as void for vagueness. First, the constitutionality of the challenged statute is to be determined by the statute's applicability to the particular facts at issue. Id., 57. "[T]hat a statutory provision may be of questionable applicability in speculative situations is usually immaterial if the challenged provision applies to the conduct of the defendant in the case at issue." Id., 58. Second, the statute must give fair warning in order to enable a person to know what conduct he must avoid. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning

[3]In the first case, the defendant received a ten year sentence on the risk of injury count and a concurrent one year sentence on the fourth degree sexual assault count. In the second case, he received a ten year sentence on each risk of injury count, the sentences to run concurrently with each other and with the sentences imposed in the first case.

and differ as to its application violates the first essential of due process of law." Id., 60, citing *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). Thus, "a penal statute may survive a vagueness attack solely upon a consideration of whether it provides fair warning." Id., 61. "References to judicial opinions involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning." Id., 62-63, citing *Rose v. Locke*, 423 U.S. 48, 50, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975).

The conduct of the defendant in sliding his hand under the thirteen year old girl's bra and feeling her breast is the claimed "act likely to impair the . . . morals of [a] child" under § 53-21. The defendant argues that there must be a touching of "private parts" for an act to come within the statute and that a breast does not qualify as such a "private part." An examination of § 53-21 reveals that the term "private parts" is not employed; there is nothing in the statute suggesting that such an area of the body need be touched before a violation occurs. Furthermore, we have never held that it is necessary that a defendant touch the "private parts" of a victim in order to commit an offense under the risk of injury statute. Quite to the contrary, we held in *State v. Dennis*, 150 Conn. 245, 188 A.2d 65 (1963), that the risk of injury statute proscribed two general types of behavior likely to injure physically or impair the morals of a minor under sixteen years of age: "(1) deliberate indifference to, acquiescense in, or the creation of situations inimical to the minor's moral or physical welfare" and "(2) acts directly perpetrated on the person of the minor and injurious to his moral or physical well-being." Id., 250. The first of these two categories clearly indicates that it is not necessary to have any touching of any part of the body to violate § 53-21; the creation of a prohibited situation is sufficient.

Although we recognize that a direct "touching" is not a necessary element of a § 53-21 offense, we find in this appeal that the defendant's "touching" of the breast was an act "directly perpetrated on the person of the minor and injurious to his moral . . . well-being." *State v. Dennis*, supra, 250. Section 53-21 does not specify the "acts" or "situations" deemed "likely to impair the morals of [a]

child"; hence, we look to the penal code for guidance since § 53a-2 states that "the provisions of this title shall apply to any offense defined in this title *or the general statutes,* unless otherwise expressly provided or unless the context otherwise requires... ." (Emphasis added.) Section 53a-65 provides the definitions applicable to sexual offenses. The code does not adopt the term "private parts" but instead uses the broader term "intimate parts." Under subsection (8) of the statute, "intimate parts" is defined as "the genital area, groin, anus, inner thighs, buttocks or breasts." The legislature chose not to limit illicit sexual acts to the commonly accepted term of "private parts" or genital areas, but to include in such acts the involvement of other parts of the body including the breasts. It is clear from § 53a-2 that this broader definition of "intimate parts" is to apply not only to the sections of the penal code pertaining to sexual offenses but to *all* sections of the general statutes pertaining to such offenses including § 53-21.

Equally lacking in merit is the defendant's claim that he had no fair warning that breast fondling was a prohibited act. He suggests that § 53-21 is unconstitutionally vague since the list of acts covered under the statute is left "completely open and undefined." We have previously recognized in *State v. Chetcuti,* 173 Conn. 165, 377 A.2d 263 (1977), that "laws may be general in nature so as to include a wide range of prohibited conduct. The constitution requires no more than a reasonable degree of certainty." Id., 167, quoting *United States v. Petrillo,* 332 U.S. 1, 7-8, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947). Furthermore, the meaning of the words "acts likely to impair the . . . morals of a child" have been clarified through several opinions of this court. For example, in *State v. Coulombe,* 143 Conn. 604, 124 A.2d 518 (1956), the offense involved the touching of the genitals of a nine year old girl. The defendant "put down [her] pants . . . put his hands in [her] pants" and "touched her flesh." Id., 605-606. In a number of other cases involving § 53-21, this court's opinions reveal that the conduct in question concerned indecent acts perpetrated on a victim. See *State v. Anderson,* 152 Conn. 196, 205 A.2d 488 (1964); *State v. Dennis,* supra. These opinions serve to warn a potential violator that the deliberate touching of the private or intimate parts of a child under sixteen in sexual and indecent

manner is prohibited. Since the conduct of the defendant with the thirteen year old girl involved such a deliberate touching of an intimate part of her body, the defendant's behavior rendered him a violator as to whom the statute was not vague. See *State v. Pickering,* 180 Conn. 54, 64-65, A.2d 322 (1980).

Lastly, we consider whether there exists a conflict between § 53-21 and § 53a-65 and related statutes which forms an unconstitutional statutory pattern. The defendant first contends that the inconsistent pattern of these two statutes makes it easier to commit an act under §, the more serious offense. Essentially, he argues that since the only difference between § 53-21 and § 53a-73a (a) (1) (A) is the intent element, the accused is deprived of an opportunity to be bound guilty of sexual assault in the fourth degree, a lesser included offense.

The defendant was charged in this case with both risk or injury and sexual assault in the fourth degree for the same conduct with the thirteen year old girl. The defendant's objection to this multiple charge is unsound since we have previously held that the same act can constitute a violation of each of these statutes. In *State v. Shaw,* 186 Conn. 45, 438 A.2d 872 (1982), this court held that as to these two statutes, one is not deemed to be a lesser included offense of the other. The necessary elements of the two statutes are distinct. The sexual assault statute requires proof of specific intent or an intentional sexual contact. The risk of injury statute requires a situation or act which could endanger the child's health or impair the child's morals. Id., 51.

Equally without merit is the defendant's claim that he has been charged twice for the same offense in violation of the double jeopardy prohibition. We have recently addressed this precise issue in *State v. McCall,* 187 Conn. 73, 444 A.2d 896 (1982). In that case, we held that the imposition of sentences on both a sexual assault in the second degree and risk of injury did not violate the constitutional right not to "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. It is only when "the elements of one offense as defined by the statute include the elements of a lesser offense; or if one offense is merely nominally

distinct from the other" that double jeopardy attaches. *State v. McCall*, supra, 91. Since sexual assault in the fourth degree and risk of injury each require proof of an element not required by the other, the defendant's claim must fail.

Accordingly, no error is found in the first case.

We next consider the error claimed by the defendant in the second case involving the fifteen year old girl. The defendant maintains that (1) the trial court erred in its charge to the jury on the issue of consent, (2) § 53-21 as applied in this case is void for vagueness, and (3) § 53-21 unconstitutionally impairs the right to privacy of himself and the fifteen year old female.

First, we must note the unique factual situation involved here. This case involves a female between the ages of fifteen and sixteen. Her age of fifteen years allows her to consent a sexual activity under the penal code; General Statutes §§ 53a-71 (a) (1), 53a-73a (a) (1) (A); yet at the same time to initiate a prosecution for risk of injury under § 53-21. The defendant contends that there was error since the trial court charged the jury that "consent on the part of the child under sixteen years of age is not a defense to the charge (of risk of injury)." He maintains that the court's refusal to charge the consent was a defense unduly limited the jury in determining whether the sexual activity impaired the morals of the minor. The defendant's argument is based on the fact that since the age of consent is fifteen in the sexual assault statutes, it is possible for a person between fifteen and sixteen years of age to consent to sexual activities which might be deemed likely to "impair her morals" *but for the fact that consent was given.* Furthermore, the defendant argues that *if* consent is not a defense, then § 53-21 is unconstitutionally vague as applied to him.[4] We agree.

[4]In effect, the defendant claims that when considering General Statutes § 53-21 vis-a-vis § 53a-71 (a) under the circumstances of this case, a quandary exists rendering vague the proscription enunciated in § 53-21. We acknowledge the conflict yet go no further. "It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." *Duart v. Axton-Cross Co.*, 19 Conn. Sup. 188, 190 (1954).

The issue of consent vis-a-vis § 53-21 is one of first impression in Connecticut. We begin our inquiry with an examination of the "Sex offenses" part VI of the penal code § 53a-65 et seq. which reveals a pattern of ages below which and circumstances under which sexual activity is forbidden. These statutes outline what constitutes corruption of the young as well as improper sexual activity with a minor. The preface to the penal code, however, gives strong indication that non-commercial, consensual sexual activity in private has no place in the criminal law. The penal code comments state that "[s]ections 53a-65 to 53a-81 adopt the basic principle that non-commerical sexual activity in private, whether heterosexual or homosexual, between consenting, competent adults, not involving corruption of the young by older persons, is not business of the criminal law... . These section [§§ 53a-65 to 53a-81] are concerned principally with prohibiting *non-consensual* sexual activity... ." (Emphasis added.)

The original penal code adopted in Connecticut prohibited any sexual intercourse with a person under sixteen years of age. See General Statutes (Rev. to 1972) § 53a-66. Yet, in 1975, § 53a-66 was repealed and the new § 53a-71 (a) changed the age of consent to fifteen. With this change, the legisiature clearly indicated that a person who had attained the age of fifteen was an adult capable of making an intelligent choice in matters relating to sex. Since, however, the legislature did not amend the age in the risk of injury statute to correspond with this revision of the sexual assault statutes, we are faced with the anamolous situation of a fifteen year old who may consent and willingly participate in sexual activity and still initiate the prosecution of her "partner" under § 53-21.

The defendant also correctly points out that *if* § 53-21 is construed to apply to a situation where a fifteen year old girl consents to normal sexual relations, while other criminal statutes appear to permit such activity, then § 53-21 would be unconstitutional if applied under such circumstances.[5] If this fifteen year old

[5]We emphasize that a statute may operate in a manner inconsistent with constitutional requirements when applied to one set of circumstances while as to another it may produce a result which makes its operation unconstitutional. See *State v. Menillo*, 171 Conn. 141, 368 A.2d 136 (1976).

girl consented to or initiated sexual contact, then it is clear that the defendant was not provided with fair warning that his conduct was prohibited. All earlier risk of injury cases have involved the *perpetration* of acts on victims under the age of sixteen. The only warning which the case law in Connecticut provides to a potential offender pertains to *subjecting or perpetrating* indecent acts on an *unwilling* victim. These cases have not presented to us possible instances of willing and voluntary participation by a person between the ages of fifteen and sixteen. See *State v. McCall,* 187 Conn. 73, 444 A.2d 896 (1982); *State v. Shaw,* 186 Conn. 45, 438 A.2d 872 (1982); *State v. Smith,* 183 Conn. 17, 438 A.2d 1165 (1981); *State v. Pickering,* 180 Conn. 54, 428 A.2d 322 (1980); *State v. Manning,* 162 Conn. 112, 291 A.2d 750 (1971); *State v. Gelinas,* 160 Conn. 366, 279 A.2d 522(1971); *State v. Anderson,* 152 Conn. 196, 205 A.2d 488 (1964); *State v. Dennis,* 150 Conn. 245, 188 A.2d 65 (1963); *State v. Coulombe,* 143 Conn. 604, 124 A.2d 518 (1956); *State v. Silver,* 139 Conn. 234, 93 A.2d 154 (1952). When a person legally capable consents to or initiates sexual contact and activity, the case law and statute itself provide no fair warning or notice of statutory prohibition. " '[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.' " *State v. Tedesco,* 175 Conn. 279, 288, 397 A.2d (1978).

In view of our conclusion that consent is a determinative issue, a new trial is ordered. Whether the fifteen year old girl consented to sexual activities with the defendant is a factual determination and, as such, is clearly within the province of the jury. See *State v. Morgan,* 170 Conn. 110, 112, 365 A.2d 99 (1977). (issue of forcible "compulsion" in rape case is question of fact for the jury). Thus, the trial court committed error in denying the defendant's request at trial for a jury instruction on consent. An instruction on consent must be given at the new trial. Furthermore, if the jury determines that consent was given, we instruct the court to dismiss the risk of

injury charges since § 53-21 would then not be violated as applied to the particular facts of this case.[6]

There is error, the judgment is set aside and a new trial is ordered in accordance with this opinion.

In this opinion the other judges concurred.

[6]We need not reach the right to privacy issue since we have disposed of this case on other grounds. Constitutional issues need not be considered unless absolutely necessary to the decision of a case. See *State v. DellaCamera*, 166 Conn. 557, 560-61, 853 A.2d 750 (1974).

APPENDIX B

**IN THE SUPREME COURT OF THE
STATE OF CONNECTICUT
MARCH 7, 1984**

STATE OF CONNECTICUT

v.

DENNIS M. PERRUCCIO

ORDER

The motion of the Defendant, filed February 8, 1984, to reargue, having been presented to the Court, it is hereby ordered denied.

BY THE COURT,

FRANCIS J. DRUMM, JR.
CHIEF CLERK

By _____
Assistant Clerk-Appellate

Notice to:
Michalik & Lynch
C. Robert Satti, S.A.
Irving Aronson, A.S.A.
Harry Gaucher, S.A.
Clerk, New London J.D.
Reporter of Judicial Decisions

3-7-84

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF CONNECTICUT

DENNIS M. PERRUCCIO, APPELLANT

v. **NO. 11524**

STATE OF CONNECTICUT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Dennis M. Perruccio, the Defendant-Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Connecticut, affirming the judgment of conviction entered herein on January 31, 1984.

The appeal is taken pursuant to 28 U.S.C., Section 1257(2).

Dennis G. Ciccarillo
Michalik & Lynch
Counsel for Appellant
P.O. Box 1598
33 Lexington Street
New Britain, CT 06050-1598
Telephone: 225-8403

CERTIFICATION

This is to certify that, on this 20th day of March, 1984, in accordance with Rule 10(2) and Rule 33 of the Supreme Court Rules, all parties required to be served under the rules have been

served, including Irving Aronson, Esq., Assistant State's Attorney, Judicial District of New London, 300 Captain's Walk, New London, Connecticut 06320.

Dennis G. Ciccarillo

IN THE SUPREME COURT OF THE STATE OF CONNECTICUT

DENNIS M. PERRUCCIO,
Appellant

v. **NO. 11524**

STATE OF CONNECTICUT,
Appellee

AMENDED
NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Dennis M. Perruccio, the Defendant-Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Connecticut, affirming the judgment of conviction entered herein on January 31, 1984, and, Motion to Reargue, denied March 7, 1984.

The appeal is taken pursuant to 28 U.S.C., Section 1257(2).

Edward T. Lynch, Jr.
Counsel for Appellant
Michalik & Lynch
P.O. Box 1598
33 Lexington Street
New Britain, CT 06050-1598
Telephone: 225-8403

CERTIFICATION

This is to certify that, on this 21st day of May, 1984, in accordance with Rule 10(2) and Rule 33 of the Supreme Court Rules, all parties required to be served under the rules have been served, including Irving Aronson, Esq., Assistant State's Attorney, Judicial District of New London, 300 Captain's Walk, New London, Connecticut 06320.

_____

Edward T. Lynch, Jr.

APPENDIX D

SUBSTITUTED INFORMATION

IN THE SUPERIOR COURT OF
THE STATE OF CONNECTICUT

Windham County *January* Term, *1981*

Harry S. Goucher, Jr.,
State's Attorney for the Judicial District of *Windham*

accuses *DENNIS M. PERRUCCIO of Norwich, Connecticut*

of *Injury or risk of injury to or impairing the morals of a child,*

and charges that at the Town or City of *Killingly,*

on or about the *16th* day of *October, 1981,* the said

DENNIS M. PERRUCCIO did commit the crime of injury or risk of injury to or impairing the morals of a child, in violation of Section 53-21 of the Connecticut General Statutes, in that the said *DENNIS M. PERRUCCIO* did do certain acts likely to impair the morals of a female child under the age of sixteen years, to wit, who was then thirteen years old, having been born on December 23, 1967, in that he put his hand under her clothing and bra and felt of her left breast and kissed her on the mouth.

SECOND COUNT

And said Attorney further charges that at the Town of Killingly, in the Windham Judicial District, on or about the 16th day of October, 1981, the said *DENNIS M. PERRUCCIO* did commit the

crime of sexual assault in the fourth degree, in violation of Section 53a-73a (a)(1)(A) of said Statutes, in that he did intentionally subject another person to sexual contact who was under fifteen years of age, to wit, a female child who was then thirteen years old, having been born on December 23, 1967.

Dated at *New London,* Connecticut this *20th* day of May, 1982.

/s/ Harry S. Gaucher, Jr.
State's Attorney

APPENDIX E

1. Excerpt of Direct Examination Kimberly Nabozny v Prosecution.

Q Okay. And then what did he do with his right hand

A He went up my shirt.

Q He went up inside your shirt?

A Yes.

Q What did he do with it then?

A Felt my left breast. And then he went under my bra, did that again. Then he hugged me. He tried to go down the back of my pants. I said, no. Then he - he hugged me. He said, friends? I didn't say anything. I just said, friends. And then he let go of me, and somebody came in, so I left.

Q Okay. Now, you say with his right hand he felt your breast outside your bra?

A Yes.

Q Is that correct?

A (Witness nodded head affirmatively.)

Q And then did he put his hand up underneath your bra and feel your breast?

A Yes.

Q Okay, how long did he do that?

A A few seconds.

TR 102

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2. Excerpt of Cross Examination of Kimberly Nabozny by Defense.

So as you stand here in court — sit here in court today, your claim is that on October 16, 1981, you were touched by Mr. Perruccio?

A Yes.

Q You're not claiming any touching before that date?

A No.

Q You're not claiming any touching after that date; right?

A No, I'm not.

Q Now when you were in the room, the locker room, with Mr. Perruccio, your claim is that he touched your left breast; right?

A Yes.

Q He didn't touch you in any of your private parts, did he?

A No.

Q Your only claim is that he touched your left breast; right?

A Yes.

TR 135-36

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Q Can you tell us fairly how long this whole incident took?

A I guess about a minute. I don't know.

Q Well, you weren't in there for a long time; right?

A No.

Q It was a rather short period of time?

A That's right.

Q Just enough time for him to slide his hand up on your breast

A Right.

Q — to touch it? And then his hand came right off?

A No, he was not — he was feeling my breast for a few seconds.

Q A few seconds?

A Right.

Tr 143-144

* * *

Q Flat against your breast?

A He went up my shirt (indicating).

Q Yes, flat against the front of your breast?

A Like this. Like this. Then he rubbed it. Then he took it out after he had done that (indicating).

Q Without — He didn't squeeze it then?

A No.

Q But you didn't experience any bruises on your breast as a result of this, did you?

A No.

Q You didn't go to a doctor and make some complaints about any bruises on your breast?

A No.

Q Did you go to a school nurse with any complaints about injury to your breast?

A No.

Q When his hand touched your breast, did it feel cold or warm?

A I don't know.

Q You don't remember?

A I was scared, okay?

Q So you don't remember whether he had cold hands?

A I don't know if he had cold hands or warm hands. I didn't go around with a temperature thermometer.

Q I'm sorry, I didn't hear you. What did you say?

A I don't go around with a thermometer.

Q Is that locker room cool or was it a cool afternoon?

A (Short pause.) I'm not sure.

TR 145-146